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84-867

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

AHNAPEE AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAUL A. CUNNINGHAM*
GERALD P. NORTON
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for Petitioner
**Counsel of Record*

PEPPER, HAMILTON & SCHEETZ
Of Counsel

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

The Interstate Commerce Act defines the national transportation policy and requires the Interstate Commerce Commission to deregulate the railroad industry by exempting railroads from regulatory provisions that are not necessary to carry out that policy. The questions presented are:

1. Did the court of appeals err in invalidating the Commission's exemption of joint rates for movements involving connecting railroads, by reading into the national transportation policy a vague requirement—not contained in the Act or its prior construction by the agency—that the division of joint rate profits between railroads be "fair"?

2. Did the court of appeals err in holding that the agency's authority to grant exemptions from unnecessary regulation cannot be invoked if the relative bargaining positions of parties due to "statutory entitlements" under the existing regulatory scheme would be affected by a partial exemption.

PARTIES TO THE PROCEEDING

Petitioners In The Court Of Appeals

Ahnapee and Western Railway Company
Aluminum Association, Inc.
American Paper Institute, Inc.
Atlantic and Western Railway Company
Bangor and Aroostook Railroad Company
Bessemer and Lake Erie Railroad Company
Board of Trade of the City of Chicago
Brae Corporation
Canadian National Railway Company
Canadian Pacific Limited
Central Vermont Railway, Inc.
Chattahachee Industrial Railroad
Continental Forest Industries, Inc.
Delaware and Hudson Railway Company
Detroit, Toledo and Ironton Railroad Company
Elgin, Joliet and Eastern Railway Company
Evans Products Company
Ford Motor Company
Graham County Railroad, Inc.
Grand Trunk Western Railroad Company
Great Southern Paper
Green Bay and Western Railroad Company
Hartford & Slocomb Railroad Company
Illinois Central Gulf Railroad Company
International Paper Company
Itel Rail Corporation
Kansas City Southern Railway Company
LaMoille Valley Railroad Company
Leaf River Forest Products, Inc.
Maine Central Railroad Company
McCloud River Railroad Company
The Mississippian Railway, Inc.
Missouri-Kansas-Texas Railroad Company
National Industrial Transportation League
National Railway Utilization Corporation
Old Augusta Railroad Company
Peninsula Terminal Company
Pickens Railroad Company
Port of Oakland
Rubber Manufacturers Association
Sandersville Railroad Company

Sea-Land Freight Service, Inc.
Sea-Land Service, Inc.
Patrick W. Simmons
Soo Line Railroad Company
H.C. Spinks Clay Company, Inc.
SYSCO Corporation

Intervenor-Petitioners In The Court Of Appeals

Alabama State Docks
American Short Line Railroad Association
American Trucking Associations, Inc.
Angelina and Neches River Railroad
Apache Railway Company
Apalachicola Northern Railroad Company
Arcata and Mad River Railroad Company
Atlanta & Saint Andrews Bay Railway Company
Brick Association of North Carolina
Brick Association of South Carolina
Brick Institute of America Region Nine
Brillion & Forest Junction Railroad Company
Brown Transport, Inc.
Cadiz Railroad Company
Canadian Pulp & Paper Association
Clarendon and Pittsford Railway Company
Columbia & Cowlitz Railway Company
Corinth and Counce Railroad Company
DBA Sierra Railroad Company
DeQueen & Eastern Railroad Company
East Camden & Highland Railroad Company
Eastern Industrial Traffic League, Inc.
E.I. Hutton Credit Corporation
Escanaba & Lake Superior Railroad Company
Funding Systems Railcar, Inc.
Greenville and Northern Railway Company
Interstate Carriers Conference, Inc.
Little Rock & Western Railway Corporation
Marinette, Tomahawk and Western Railroad Company
Meridian & Bigbee Railroad Company
Mississippi & Skuna Valley Railroad Company
Mississippi-Louisiana Brick & Tile Manufacturers Association
National Grain and Feed Association
Oregon, California & Eastern Railway Company
Pittsburgh & Lake Erie Railroad Company

Rahway Valley Railroad
Regular Common Carrier Conference, Inc.
Sabine River and Northern Railroad Company
Seattle & North Coast Railroad Company
Silver Foot Inc.
Southern Traffic League, Inc.
Southwest Forest Industries, Inc.
Terminal Railway
Texas Mexican Railway Company
Texas, Oklahoma & Eastern Railroad Company
Totem Ocean Trailer Express, Inc.
Upper Mexican and Plymouth Railroad Company
Valdosta Southern Railroad Company
Vermont Railway, Inc.
Weyerhaeuser Company
Wisconsin and Southern Railroad Company

Respondents In The Court Of Appeals

Interstate Commerce Commission
United States of America

Intervenor-Respondents In The Court Of Appeals

Burlington Northern Railway Company
Southern Pacific Transportation Company
Consolidated Rail Corporation*

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*Petitioner Consolidated Rail Corporation has no parent company. Its subsidiaries and affiliates are as follows:

Subsidiaries

Buffalo Creek Railroad Co.
Calumet Western Railway Co.
Canada Southern Railway Co.
Consolidated Equity Corp.
Detroit River Tunnel Co.
Indiana Harbor Belt Railroad Co.
Jersey Central Transportation Co.
Merchants Despatch Transportation Co.
Niagara River Bridge Co.
Penn Central Communications Co.
Pennsylvania Truck Lines, Inc.
Philadelphia, Reading & Pottsville Telegraph Co.
Relco-PA Inc.
St. Lawrence & Adirondack Railway Co.

Affiliates

Akron & Barberton Belt Railroad Co.
Albany Port Railroad Corp.
Belt Railway Co. of Chicago
Chicago & Western Indiana Railway Co.
Fruit Growers Express Co.
Lake Erie & Eastern Railroad Co.
Lakefront Dock & Railroad Terminal Co.
Monongahela Railway Co.
Nicholas, Fayette & Greenbrier Railroad Co.
Peoria & Pekin Union Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Co.
Terminal Railroad Association of St. Louis, Inc.
Toledo Terminal Railroad Co.
Trailer Train Co.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The pertinent opinions of the Interstate Commerce Commission (Pet. Apps. D, E and F, 103a-52a, 153a-89a, 191a-217a)[1] are reported at 367 I.C.C. 423 and 745. The opinion of the court of appeals (Pet. App. A, 1a-95a) is reported at 740 F.2d 1023. The orders of the court of appeals amending its opinion, responding to petitioner's motion for clarification, and denying the petitions for rehearing and suggestions for rehearing en banc (Pet. App. C, 96a-101a), are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1984 (Pet. App. H, 218a). A timely petition for rehearing and

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[1] "Pet. App." refer to the appendix to the petition for a writ of certiorari to review the decision below filed by the Interstate Commerce Commission on October 4, 1984, in No. 84-550.

suggestion for rehearing en banc was denied on August 27, 1984 (Pet. App. C, 96a), and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

The relevant statutory provisions of the Interstate Commerce Act, as amended by the Staggers Rail Act of 1980, are 49 U.S.C. §§ 10101a, 10321(a), 10505, and 11122, which provide as follows:

> § 10101a. In regulating the railroad industry, it is the policy of the United States Government—
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10321. (a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

* * *

§ 10505. (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 11122. (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive,

freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

STATEMENT OF THE CASE

In the Staggers Rail Act of 1980 Congress extensively amended the Interstate Commerce Act ("ICA") to reduce excessive regulation of railroads. Congress found that the rationale for enactment of the ICA—the need to protect shippers from the abuse of railroad market power—no longer existed in most areas because improvements in other modes of transportation had rendered "most transportation within the United States * * * competitive."[2] Regulation was impeding railroad efforts to regain financial health and remain viable in the private sector. Thus, as a "cornerstone" of the Act, Congress broadened the authority of the Interstate Commerce Commission ("ICC") to grant exemptions from regulation.[3] For regulatory matters affecting railroads, Congress set forth a 15-point national transportation policy ("NTP") in section 10101a of the ICA (pp. 2-3, *supra*), and *required* the ICC to grant an exemption wherever it found that continued regulation was not necessary to carry out the NTP or to protect

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[2] Staggers Rail Act, Pub. L. No. 96-448, § 2, 84 Stat. 1895 (1980); *see* 49 U.S.C. § 10101a (historical note).

[3] *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 79 (1980).

shippers from the abuse of market power. 49 U.S.C. § 10505.[4] Section 10505 also authorized the ICC to revoke or modify an exemption if necessary to carry out the NTP. 49 U.S.C. § 10505(d).

The hallmark of competitive markets is the ability of competitors to set and change their own prices for their services. However, prior to the Staggers Act, a railroad wishing to cancel a "joint rate"[5] without the concurrence of the other carriers participating in the rate (in order, for example, to permit negotiation of a new joint rate or application of another form of rate to a multi-carrier movement) was required by the ICA to obtain ICC approval, a costly and time-consuming process. 49 U.S.C. § 10705(e). This requirement was part of a comprehensive scheme of administered prices which encouraged collective rate setting free of antitrust sanctions and equalized rates for all routes to discourage price competition.

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[4] Section 10505(a) (p. 3, *supra*) provides in relevant part that the ICC "shall exempt" a person, transaction or service if it finds that a provision of the ICA

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
>
> * * *

[5] Joint rates are one type of rate which may apply to a through route (which the ICA requires railroads to maintain (49 U.S.C. § 10703(a)(1)), *i.e.*, a route which involves the participation of more than one railroad. Joint rates specify a single charge which a shipper must pay for a through movement. The participating carriers' respective shares or "divisions" of the revenue produced by the joint rate are fixed apart from the level of the rate. Most joint rates were set when carriers enjoyed antitrust immunity (abrogated by the Staggers Act) to set rates collectively, and were required by the ICC to be equal over competing routes regardless of the relative efficiency of the routes. If joint rates are cancelled, other types of rates continue to apply on through movements. The only difference is that each carrier is free to set its charge for its portion of a through movement, thus assuring that cancellation of joint rates does not "close" (i.e., preclude the use of) the affected through routes.

In passing the Staggers Act, Congress recognized that such regulation had led to severe problems of "too low rate divisions and a proliferation of uneconomic routes,"[6] and it enacted new provisions to expedite and simplify the approval process. *See* 49 U.S.C. § 10705a.[7]

However, Congress recognized that these new provisions would not completely solve the problem, as they still limit a railroad's freedom to change the rates for its portion of a through route in which it participates, without the concurrence of all participating carriers. It therefore directed the ICC to use the exemption power so that "as many as possible of the Commission's restrictions on changes in prices * * * will be removed * * *" (H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980) (conference report), and, more specifically, "to use the exemption authority to abolish joint rates, if such an action appears desirable * * *." 126 Cong. Rec. 28430 (1980) (remarks of Rep. Madigan, a sponsor and conferee, explaining the Conference Report).

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[6] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 111 (1980) (conference report).

[7] Prior to the Staggers Act, under 49 U.S.C. § 10705(e) a railroad could independently alter an established joint rate or division or set a price for its portion of a through movement only by obtaining the concurrence of all participating carriers (which was often not forthcoming) or by initiating a time-consuming regulatory proceeding in which the carrier proposing cancellation or alteration of a joint rate or division was required to prove that its proposed action was in the "public interest." Section 10705(e) requires consideration of comparative distances, transit times, and energy consumption on different routes, and the overall impact of a cancellation on the shippers and carriers affected by it. These restrictions in some instances were anticompetitive and imposed serious burdens on carriers seeking the price flexibility required to succeed in competitive markets. Congress sought to ease these burdens by adding 49 U.S.C. § 10705a, an alternative procedure under which a carrier can unilaterally cancel or surcharge any joint rate to ensure that the carrier receives revenue from a through movement that is at least equal to 110% of the variable costs incurred in the movement. Cancellation of joint rates which yield revenues above this marginally profitable level continue to be subject to the public interest test of section 10705(e).

ICC regulations also govern the terms under which railroads interchange boxcars, as required by the ICA. 49 U.S.C. § 10742. Pursuant to 49 U.S.C. § 11122 (pp. 4-5, *supra*) the ICC had established a system of "car hire" regulation under which a carrier owning a boxcar is compensated by other carriers when the car is on their lines, whether loaded or empty. The rules, which specified the level of car rental regardless of demand for the car,[8] and prohibited other charges, resulted in excessive investment in boxcars, needless movement of empty boxcars and costly inefficiencies, at a cost of hundreds of millions of dollars annually.

The ICC invited comments on a request by petitioner Consolidated Rail Corporation ("Conrail") to eliminate impediments to boxcar competition by exempting boxcar traffic from all forms of regulation (Pet. App. 123a-24a). Boxcar traffic is substantial, accounting for about $800 million in revenues for Conrail alone in 1983 (one fourth of its total revenues), but for Conrail and the rest of the industry, boxcar traffic had declined in volume by half from 1977 to 1982 (Ct. App. Jt. App. 2029),[9] in the face of intense truck competition.

After considering comments on the proposed exemption as to rates, including those from lessors of railroad cars and Class III (short line) railroads,[10] who argued that large railroads

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[8] These rental payments are composed of time ("per diem") and mileage payments. Prior to the exemption, a railroad was compelled to pay car hire whenever another railroad's boxcar was on its lines even if the car was empty and in storage (with the consent of the owner), and even when a carrier was required to return empty cars to the owner free of charge. Some of the costly and inefficient aspects of the car hire rules are summarized in the court of appeals' decision (Pet. App. 51a). Perversely, as the court noted, car hire fees increase when demand for the car decreases (Pet. App. 51a).

[9] "Ct. App. Jt. App." refers to the joint appendix filed in the court of appeals.

[10] Class III railroads are those with less than $10 million in annual operating revenue. *See* 49 C.F.R. § 1201 1-1 (1983). Many Class III railroads are owned by shippers or have relationships with owners and lessors of boxcars by which short lines are provided free use of the cars and the owner/lessor's investment in the cars is tax sheltered (Pet. App. 133a, 166a-67a, 178a).

might cancel through routes with short-line railroads, the ICC granted the exemption. The ICC found that regulation of maximum rates or joint rates for boxcar traffic was not necessary to carry out the NTP or to protect shippers from abuse of market power (Pet. App. 106a-127a). Because of pervasive truck competition for such traffic, the ICC found that rail carriers do not possess market power (Pet. App. 114a-22a). The ICC also noted that through the antitrust laws and revocation of the exemption, other remedies were available for any abuse of market power that might exist (Pet. App. 108a, 121a, 22a, 126a, 136a, 138a, 181a, 196a). The ICC also found that a rational rail carrier had economic incentives for maintaining efficient through routes (Pet. App. 123a-24a, 161a-62a). Accordingly, the ICC found that continued regulation of boxcar rates was not necessary to serve the NTP (Pet. App. 126a-27a).

Confronted with a record of staggeringly expensive and inefficient empty boxcar movements (see Pet. App. 51a),[11] the ICC found that its car hire rules under section 11122 promoted overinvestment in and underutilization of boxcars. By assuring car owners full recovery of their ownership costs regardless of the demand for or the efficiency of boxcar use, the rules burden railroads with economically unwarranted costs—especially "destination" carriers like Conrail which deliver much more boxcar traffic to destinations on their lines than they originate. To permit a greater role for market forces to affect the level of car rental charges and, consequently, of boxcar rates, and to reduce the costly inefficiencies of the pre-existing scheme, the ICC granted Conrail's request for a partial exemption of boxcars from the car hire rules.[12]

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[11] The record contains an estimate that the exemption could reduce empty car miles by nearly one third (1.1 billion car miles) resulting in a savings of at least $330 million annually (Ct. App. Jt. App. 1202-03).

[12] Conrail had modified its request after comments expressed opposition to complete exemption.

Thus, the ICC (1) made the findings required by section 10505(a), (2) completely exempted carriers from the car hire rules with respect to bilateral agreements governing car hire rates, empty movements, and storage,[13] and (3) granted a partial exemption from the other car hire rules, thereby affording destination carriers some of the freedom they would have in a fully deregulated market to charge a car owner for storing or returning its empty car if unable to negotiate bilateral agreements, and thus to assure that those railroads responsible for imposing the costs of moving empty cars could no longer avoid paying them.[14] The ICC reasoned that by allowing costs to be borne by those creating them, more efficient use of cars and reduced costs would result, and carriers that had not had such incentives before would now have incentives to negotiate agreements to improve boxcar utilization. (Pet. App. 127a-34a; 163a-83a; 198a-200a).

The ICC noted that it could achieve the resulting changes in the car hire rules through either its exemption authority under section 10505 or its affirmative regulation authority under section 11122 (Pet. App. 136a), but it ultimately relied only upon the former (Pet. App. 166a-67a). In response to objections that even this partial exemption would have substantial effects on some parties and was beyond the scope of section 10505, the ICC observed that "[e]very exemption necessarily affects the fortunes of those businesses which were benefitted by regulation" (Pet. App. 178a), and that "Congress surely did not intend to create a legal framework in which reasonable

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[13] Prior to the exemption the ICC had granted limited temporary authority for carriers to enter into bilateral agreements for car hire rental below the prescribed rate. Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroad Per Diem Levels*, 364 I.C.C. 291 (1980).

[14] Thus, the ICC allowed destination railroads to cease paying car hire for empty boxcars stored on their lines with the owner's consent, and permitted such railroads to assess a charge of up to 35 cents per mile (a level at or below the variable cost of moving an empty boxcar) when an owner demands that its boxcar be returned empty (Pet. App. 165a).

intermediate phases [short of complete exemption] are forbidden" (Pet. App. 168a).

Reflecting the highly complex and technical nature of the subject matter, the ICC explained its findings that the exemptions were required under section 10505 in a series of four decisions addressing at length the rationale for and comments made on the proposed exemption (*see* Pet. App. 103a, 153a, 190a).[15]

Judicial review of the ICC's decision was sought by shippers, primarily challenging the exemption from regulation of overall rate levels, and by railroads, primarily challenging the exemption from regulation of joint rates and the car hire rules.[16] The court of appeals upheld the ICC's decision that competition, which made monopoly profits impossible, had rendered maximum rate regulation for boxcar traffic unnecessary (Pet. App. 20a-21a). However, the court vacated the ICC's decision that regulation of joint rate changes and divisions is unnecessary to carry out the NTP (Pet. App. 37a-50a). The court vacated the car hire exemption on the ground that it was not an exemption but affirmative substantive regulation (Pet. App. 50a-69a).

The court set aside joint rate exemption even though, in upholding the ICC's exemption of boxcar movements from maximum rate regulation, it had sustained the ICC's finding that, because of pervasive truck competition for such traffic, rail carriers do not possess market power that might be abused to the detriment of shippers (Pet. App. 27a), and had, like the ICC, noted that other remedies for any actual abuse of market

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[15] The ICC's decision became effective on January 1, 1984, except that with respect to cars owned or leased by small railroads the effective date of the car hire exemption was twice deferred (Pet. App. 184a-85a). By decision dated June 26, 1984, the ICC indicated its continued willingness to consider constructive proposals for alternative approaches to its limited exemption; in all other respects the ICC (and the court below) denied stays (*e.g.*, Pet. App. 190a-214a).

[16] The ICC's action was supported in the court below by the United States (*cf.* Pet. App. 126a).

power were available through the antitrust laws or the ICC's revocation of the exemption (Pet. App. 34a), remedies that are also available with respect to cancellation or division of joint rates.

The ICC had also found that, in view of the impossibility of monopoly profits, the economic incentives of a rational carrier to maintain efficient joint routes (and the availability of remedies for dealing with any abuses), justified the findings specified by section 10505(a). This meant that the ICC was required to exempt from regulation joint rate changes and divisions and the closing of through routes (Pet. App. 123a-24a).

Nonetheless, the court of appeals set aside the ICC's finding that the regulation of joint rates was not necessary to carry out the NTP. Adopting an interpretation of the ICA that had not been urged by any party before the ICC or in the briefs on appeal, the court held that the NTP requires a "fair" division of profits produced by joint movements, one which not only provides a compensatory return to each participating carrier but assures each of the share of any additional profits (i.e., monopoly profits or "rents") that it "deserves." The court concluded that the ICC had failed to consider this policy concerning "unfair divisions" of profits, which is not set forth in any provision of the ICA (Pet. App. 44a-50a). The court did not reconcile its concern about division of monopoly profits with its earlier finding that monopoly profits are not expected to arise as a result of the exemption (Pet. App. 20a-34a).

The court of appeals set aside the exemption as to car hire on the ground that it did not constitute an exemption because it affected the "relative bargaining positions" of parties and their "statutory entitlements" under the pre-existing regulatory scheme. The court acknowledged that Congress empowered the ICC to adopt either "complete" or "partial" exemptions (Pet. App. 56a-57a, quoting H.R. Rep. No. 1430, *supra*, at 105), and that it could wholly exempt compliance with section 11122 and the ICC's car hire rules thereunder (Pet. App. 69a). However, the court rejected the partial car hire exemption as an improper use of the exemption authority (Pet. App. 57a-

66a), since it did not wholly eliminate existing "statutory entitlements" but, by permitting carriers to take previously impermissible actions within specified limits, created new entitlements. The court saw this as a "policy choice" that altered the "relative bargaining positions" of car owners and users without relying exclusively on market forces (Pet. App. 60a-65a). According to the court, therefore, the partial exemption constituted affirmative "substantive regulation" rather than "deregulation" and could not be achieved through an exemption but only, if at all, by regulation pursuant to section 11122, on which the ICC did not rely. (Pet. App. 54a-69a).

REASONS FOR GRANTING THE WRIT

A.

The questions presented raise the important issue of whether the ICC will continued to have the ability to implement Congress' mandate to deregulate the rail transportation industry by freeing it from burdens and limitations imposed as much as 90 years ago and no longer justified. *Cf.*, *e.g.*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 382 (1974). In the Staggers Rail Act of 1980, Congress sought to accelerate the pace of deregulation it had begun a few years earlier.[17] In addition to amending the ICA to eliminate directly some unneeded regulatory constraints,[18] the Staggers Act required the ICC to deregulate further by seeking out and granting exemptions whenever it can make the findings specified in section 10505(a).

In two respects the court of appeals' decision will defeat Congress' clear intention by significantly curtailing the ICC's ability to exercise its important exemption authority:

(1) The decision below injects into the NTP, the principal standard under which the ICC's duty to grant an exemption is determined, an unprecedented and vague element that will be

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[17] *See* Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[18] *See* H.R. Rep. No. 1430, *supra*, at 80-83.

a factor not only in exemption proceedings but in any other proceeding requiring consideration of the NTP,[19] and that is inconsistent with the basic deregulatory purpose of the Staggers Act.

(2) Based on free-wheeling and unconventional second-guessing of the ICC's economic analysis, the decision below imposes unfounded and novel limitations on the ICC's ability to exercise its broad exemption authority, thereby perpetuating needless and costly regulation.

In the instant case, these rulings will have a substantial impact in that they will surely delay, and may make it impossible to achieve, the benefits of the boxcar exemption. As noted, the ICC's car hire rules alone impose on financially strapped railroads hundreds of millions of dollars in needless costs every year. The decision below also has substantial importance beyond this proceeding. The court's ruling as to joint rates will affect every proceeding requiring consideration of the NTP, while the ruling as to car hire will limit the ICC's authority as to every exemption proceeding.[20]

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[19] Other provisions of the ICA expressly require the ICC to apply the NTP. *E.g.*, 49 U.S.C. §§ 10702(b), 10704(d), 10706(a)(2), 10707a(d)(2)(B)(iii), 10712, 10761, 10762(f), 10922(b)(2)(A), (i)(2). Indeed, the ICC is obliged to consider the NTP in all actions it takes. *See, e.g.*, 49 U.S.C. § 10101(b); *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 87-88 (1957).

[20] The questions presented are ripe for review. The court's ruling as to joint rates requires the ICC to engage in further consideration of a complex issue that was not the subject of comments in the prior proceedings, an undertaking which would be entirely unnecessary if the court of appeals has erred in construing the deregulatory Staggers Act to require consideration of the "fairness" of divisions of profits on joint rates. In addition, the court directed that any interim rules the ICC issues must address this perceived problem (Pet. App. 93a). As to the car hire issue, the court's ruling leaves the ICC no room through further consideration in the exemption proceeding to achieve the result it seeks. The ICC's only apparent option is to institute a rulemaking proceeding under section 11122, and the court left open the question whether the ICC could achieve the desired result even through that avenue (Pet. App. 69a).

B.

The court's decision conflicts with decisions of this Court and other courts of appeals on important questions of administrative law and the proper scope of judicial review (see pp. 16 n.22, 20, 22-23, *infra*). Even in the absence of a conflict, however, the decision below would warrant review because all rules, regulations and final orders of the ICC may be brought to the court below for judicial review (28 U.S.C. §§ 2342(5), 2343), and the ICC may have no practical choice but to treat the decision below as definitive with respect to the requirements of the NTP and the scope of its authority to grant exemptions. *Cf. United States* v. *Mendoza*, 104 S. Ct. 568, 573 (1984) (preclusive effect of court of appeals decision may justify certiorari).

C.

The court's rulings on the questions presented are erroneous.

1.

The joint rate exemption was required by the ICC's finding that continued joint rate regulation was not necessary to carry out the NTP and was not needed to protect shippers against abuses of market power (Pet. App. 123a-29a). Reiterating a conclusion it had reached in other recent proceedings,[21] the ICC determined that, even though carriers would be free to cancel joint rates, there was little likelihood "that a carrier acting in an economically rational manner would close efficient routings * * *" (Pet. App. 124a).[22] In addition, with respect to

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[21] *See, e.g.*, Pet. App. 161a, 199a-200a; Ex Parte No. 445, *Standards for Intramodal Rail Competition*, 48 Fed. Reg. 31672, 31674 (July 11, 1983); *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *rev'd on other grounds sub nom. Detroit, T. & I. R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984).

[22] Although not setting aside the exemption with respect to through routes (*see* Pet. App. 50a, 92a), the court took issue with this conclusion as well, dismissing it as a "bald assertion" that contradicted an "admission" by the ICC "that large carriers have an incentive to close off efficient competing

the entire exemption, the ICC noted that it would continue to monitor carrier actions and would modify or revoke the exemption if warranted (Pet. App. 121a, 136a, 138a, 181a, 196a).[23] As

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routes to gain monopoly power over a haul from a given origin to a given destination" (Pet. App. 42a-43a). As the court elsewhere noted, however, the ICC had fully explained its rationale for this conclusion (Pet. App. 39a-41a, 45a, 46a). That rationale has been endorsed in other cases with which the decision below is therefore in conflict. *E.g.*, *Chesapeake & O. Ry.* v. *United States*, 704 F.2d 373, 377 (6th Cir. 1983) (Posner, J.) (closing efficient through routes would be "commercial suicide"); *Central Vt. Ry.* v. *ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983). The asserted "admission" was based on the ICC's statement that "route closings *might* occur *if* a carrier wishes to close routes that involve long hauls over the lines of connecting railroads in order to concentrate the traffic in routes that involve hauls over its own lines" (Pet. App. 124a; emphasis added). However, the ICC did not mention or make any admission about large carriers closing efficient routes or gaining monopoly power. In context it is clear that the ICC's statement meant that *any* carrier has powerful incentives to route traffic over its efficient single line routes rather than over inefficient joint line routes or, conversely, over efficient joint line routes rather than inefficient single line routes, not to gain monopoly power (an objective which is virtually always foreclosed by competition from trucks) but to be more competitive and ultimately more profitable. The court further suggested that the ICC's analysis of the relationship between larger railroads and Class III railroads focussed only on the "short run" (Pet. App. 48a). However, the ICC's finding that large carriers benefit from joint movements with efficient Class III railroads was not limited to the short run, nor was its finding that Class III carriers have significant strength to bargain with large carriers and that large carriers have substantial economic incentives to see that smaller connecting carriers operate efficiently and obtain a healthy return (Pet. App. 161a-62a, 174a-80a, 183a, 198a-99a).

[23] In addressing joint rates the court evidently overlooked the ICC's reliance on post-exemption monitoring and revocation, for it suggested that the ICC was relying "mere[ly]" upon the existence of antitrust remedies as providing post-exemption protection (Pet. App. 43a, 44a). However, in another portion of its opinion (see Pet. App. 15a n.*), the court recognized that Congress " 'expected[ed] * * * that the Commission will adopt a policy [once an exemption has been granted] of reviewing carrier actions after the fact to correct abuses of market power' " (Pet. App. 34a, quoting from H.R. Rep. No. 1430, *supra*, at 105), and based its decision to affirm the ICC's exemption of boxcars from maximum rate regulation in part on the ICC's statement that it would follow that policy. This possibility of revocation has

contemplated by Congress,[24] the ICC also took account of the availability of antitrust remedies to prevent or cure anticompetitive problems arising under the exemption (Pet. App. 108a, 122a, 126a).[25]

In finding the ICC's rationale inadequate the court below held (1) that the NTP requires a "fair" division of profits from joint movements and (2) that the ICC had failed expressly to consider this previously unrecognized requirement (Pet. App. 50a). In the court's view, the profits from joint operations must be "fairly" apportioned between large and small participating carriers, particularly so-called "captive" carriers that connect only with larger carriers. Even if the divisions were fully compensatory, and provided each participant with enough revenue to stay in business (*i.e.*, a reasonable return adequate to attract and retain private capital), the court asserted that it would be "unfair" if a larger carrier could gain a "disproportionate" return or share of additional profits relative to a smaller carrier (Pet. App. 45a-49a & n.1).[26]

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been held to provide railroads with "a strong incentive" not to abuse any market power they may have. *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981).

[24] H.R. Rep. No. 1430, *supra*, at 83, 105.

[25] In its original opinion, the court stated that the ICC had "nowhere mentioned antitrust remedies" as post-exemption protection against feared abuses (Pet. App. 43a). In the face of rehearing petitions noting this and other errors, the court amended its opinion to acknowledge that the ICC had already mentioned the antitrust laws as remedies for predatory pricing by large railroads against small railroads, but the court stated that the ICC had not specifically referred again to such remedies with particular respect to "co-participation in joint rates or through routes" (Pet. App. 95a). On that basis the court rejected reliance upon antitrust remedies as a "post hoc rationalization of agency counsel" (Pet. App. 43a, *citing Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983)). In so ruling, the court of appeals erroneously applied that doctrine.

[26] The court focussed its attention on the issue of how the railroads participating in a joint rate would divide monopoly profits (Pet. App. 44a-45a n.1), the occurrence of which to any significant degree is precluded by the ICC's finding—upheld by the court below—that railroads lack the market power

A fundamental error in the court's analysis is that this vague and unprecedented regulatory policy is nowhere set forth in the 15-point NTP[27] referred to in section 10505, which embodies the only criteria in the ICA against which the ICC's boxcar exemption must or may be assessed.[28] While the court referred to several of the 15 elements of the NTP expressly set forth in section 10101a, all of which the ICC had directly addressed (Pet. App. 122a-23a, 126a), the court did not and could not state that any of those elements by its terms addressed "unfair" divisions or profits (Pet. App. 45a-49a).[29] Indeed, the court

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required to earn monopoly profits. Presumably the court's reference to large carriers having "monopoly power" (Pet. App. 44a) was addressed not to the power of large carriers to impose rates to shippers that exact monopoly profits, but merely to the fact that some short lines connect only to a single larger carrier. If the court's concern about "unfairness" is limited to division of monopoly profits, which cannot arise, it addresses a straw man.

[27] Although it appears elsewhere in the Staggers Act (49 U.S.C. § 10706 note), the term "unfair" does not appear in the NTP set forth by that Act. The term "fair" appears in the NTP only in contexts not here relevant. 49 U.S.C. §§ 10101a(2) ("fair and expeditious regulatory decisions"), (12) ("fair wages").

[28] In addition to requiring consideration of the NTP, section 10505(a)(2) expresses Congressional concern about "protect[ing] *shippers* from the abuse of market power" (emphasis added), but there is no comparable protection specifically directed at other carriers. Subsequent to the decision in this case the court below concluded that the provision of section 10505(a)(2) concerning protection of shippers embodies a policy that requires ICC scrutiny of the fairness of the post-deregulation division of profits between railroads and shippers even where the shippers are receiving compensatory amounts. *Coal Exporters Ass'n* v. *United States*, No. 83-1629 (D.C. Cir. Sept. 18, 1984), slip op. 38-47. Since subsection (2) applies only to protection of shippers, the court's analysis in that case (if correct) tends to negate the presence of a similar requirement in the NTP referred to in subsection (1).

[29] The court cited subsection (13) of the NTP, stating a policy "to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination," and asserted that "[t]his antidiscrimination policy was meant to provide safeguards against 'predatory practices which constitute unfair competition. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54 * * *" (Pet. App. 48a; *sic*). (In fact, the court misquoted

relied largely upon statements in House debates concerning other requirements of the ICA not set forth in the NTP (Pet. App. 45a-49a).[30]

In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), this Court noted that the NTP was not "a set of self-executing principles that inevitably points the way to a

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the House report, which was addressing the entire NTP and not the antidiscrimination policy and did not purport to establish a policy against "unfair competition" going beyond the 15 points of section 10101a.) The court simply declared that "it is unfair competition for a large long-haul carrier to appropriate a captive short-haul carrier's joint rate profits * * *" (Pet. App. 48a), but cited no legislative history or other authority indicating that Congress intended in this deregulatory statute (or elsewhere) to require the ICC to embark on an unprecedented inquiry as to the "appropriate" or "fair" division of profits under joint rates.

The court also cited subsection (10) of the NTP, which "encourage[s] honest and efficient management of railroads, and, in particular, the elimination of noncompensatory rates for rail transportation." However, this provision and the statement about it in the House debates which the court quoted (Pet. App. 48a-49a) are explicitly addressed to the overall rates *to shippers*, not to the division of profits among carriers participating in through movements. *See* 126 Cong. Rec. 18274 (1980) (remarks of Rep. Eckhardt).

Finally, the court cited subsection (4) of the NTP, but that provision merely seeks to ensure "a sound rail transportation system with effective competition among rail carriers."

[30] The court quoted a statement by Rep. Lee asserting that, under the exemption provision already part of the Staggers bill, a large carrier should not be allowed to "squeeze" a smaller carrier on a joint rate or division (Pet. App. 46a-47a). However, Rep. Lee was discussing provisions concerning small carriers he proposed for inclusion in section 10705a—which provided for joint rate surcharges and cancellations in specified circumstances—and he identified no provision of the NTP that would address this issue. Moreover, neither section 10705 nor section 10705a purports to regulate "fairness" of divisions; they only authorize changes in existing joint rates, and they have not previously been construed as barring joint rate cancellations, or prohibiting particular joint rates or divisions because of "unfairness" in divisions of profits. In relying upon Rep. Lee's statement about section 10705a the court also misapprehended the relationship between that section and section 10705(e) (*see* pp. 6-7 n. 7, *supra*), under which carriers can cancel joint rates regardless of whether section 10705a is satisfied. *Southern Ry.* v. *ICC*, 681 F.2d 29, 35 (D.C. Cir. 1982).

clear result in each case," and held that resolution of conflicts among those "overlap[ping]" principles "is the task of the agency that is expert in the field." *Id.* at 92. Significantly, the court cited no indication that the ICC, which is primarily responsible for implementing the ICA and the Staggers Act exemption mandate, has ever suggested that the NTP addresses the "unfairness" of divisions of profits from joint movements. Congress has not provided, and this Court has never held, that the courts may supplement or define the principles of the NTP by adding elements not found there by the expert agency.

Finally, even if its analysis of the ICA were correct, the court erred in taxing the ICC with having failed to consider the court's novel "fair divisions" reading of the NTP, as it had not been urged by any party in the extensive proceedings before the ICC nor in the briefs in the court of appeals

. *See, e.g., United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978). This error was especially grievous in light of the court's disregard of the clear meaning of the ICC's related findings. The ICC could not have found that efficient routes would be maintained in the absence of joint rate regulation unless it had also determined that the divisions of revenues reached in bargaining between participating carriers would be sufficient to sustain efficient operations by all participating carriers. (see n.27, *supra*).

2.

In holding that the car hire exemption constituted not deregulation but affirmative "substantive" regulation permissible only under section 11122, the court applied an erroneous standard for determining what constitutes an exemption authorized by Congress and was in conflict with other decisions

of this Court.[31] The Court's premise is reflected in its description of the impact of the partial car hire exemption:

> Under the *Boxcars* decisions, the originating carrier enters negotiations against a background in which it has a statutory entitlement equivalent to the amount of per diem [prescribed rental charges]. The destination carrier, however, now has a statutory entitlement equivalent to the storage fees[32] and the empty return charges. In striking contrast, had the Commission actually deregulated car hire, then neither party would enter negotiations with a statutory entitlement and the market alone would establish the relative bargaining positions of the parties. It thus becomes obvious that the Commission has shifted entitlements to a point that represents neither deregulation nor the pre-*Boxcars* design. [Pet. App. 61a.]

Even assuming arguendo that the court correctly described the result (and it did not),[33] the court's "entitlements" rule is an erroneous and severe limitation of the ICC's exemption authority under section 10505. Absent total deregulation of prices and services, any exemption can be said to reflect a policy choice to permit new forces to offset the regulatory

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[31] In divining a Congressional intention that exemptions result in all respects in "*decreased* regulation" (emphasis in original), the court of appeals relied upon irrelevant state court decisions construing a state property tax exemption statute and a lease provision for exemption from liability (Pet. App. 57a, citing *Maine Water Co.* v. *City of Waterville*, 93 Me. 586, 45 A. 830 (1900); *Davidow* v. *Jenks*, 48 N.Y.S.2d 586, 587 (N.Y. Sup. Ct. 1944)).

[32] Contrary to the court's characterization, the exemption does not authorize "storage fees," but, as would the market, merely permits avoidance ("reclaim") of per diem when neither the user nor the owner has a use for the car. A car owner can reinstate the accrual of car hire by ordering the empty car sent home.

[33] The court's description overlooked the relation of the car hire exemption to the joint rate exemption and the basic free market bargaining process permitted by both parts of the boxcar exemption. The joint rate exemption enables an originating carrier to respond to a terminating carrier's assessment of empty movement charges, *e.g.*, by cancelling joint rates, or increasing the rate for its portion of through movements which result in empty returns (Pet. App. 165a, 170a, 175a-76a). Thus, the ICC did not simply shift

"entitlements" of those benefitted by the remaining regulation, yet that fact has not impaired any of the ICC's major exemptions approved by the courts to date.[34] The court cited no indication of Congressional intent that partial exemptions that achieve only limited deregulation are beyond the scope or intent of section 10505.[35]

In rejecting the ICC's use of its deregulatory exemption authority under section 10505, based in part on the existence of rulemaking authority under section 11122, the court of appeals also relied on this Court's recent decision in *ICC* v. *American Trucking Associations, Inc.*, 104 S. Ct. 2458 (1984) *("ATA")* (Pet. App. 66a-68a), which the parties had no opportunity to address below. However, rather than support the court of

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the relative entitlements of the parties, but significantly increased the extent to which market forces can influence inter-carrier relations by freeing both originating and terminating carriers *pro tanto* from restrictions on pricing their services (*see* Pet. App. 176a). Of course, the car hire partial exemption would achieve a significant measure of deregulation even if there were no exemption as to joint rates. In either event, while the result may be less than total deregulation, the car hire exemption is nevertheless a substantial step in that direction.

[34] *See, e.g., American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (court sustained partial exemption of specified category of rail transportation from most but not all statutory provisions, thereby altering bargaining positions of such carriers vis-a-vis shippers); *Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) (partial exemption affirmed even though it did not allow market forces to operate fully and reflected a "policy choice" the impact of which favored some parties more than others); *cf. National Small Shipments Traffic Conf.* v. *CAB*, 618 F.2d 819, 832 (D.C. Cir. 1980) (agency properly exercised deregulatory authority in exempting certain air carriers from specified regulatory requirements, thereby altering bargaining positions of parties or asserted statutory entitlements).

[35] The legislative history cited by the court indicated only that Congress' goal in section 10505 and other provisions of the Staggers Act was to eliminate needless regulation where possible and to limit or reduce the remaining regulation to a level constituting the least extent necessary to satisfy the NTP, in order to afford greater reliance upon the marketplace (Pet. App. 58a-59a). The ICC's construction of its exemption authority here is consistent with that intent.

appeals' crabbed reading of the ICC's exemption authority, *ATA* suggests that the court erred in not according the ICC appropriate "latitude to interpret its statutory powers in a reasonable manner." *Id.* at 2465.[36] The court of appeals also disregarded 49 U.S.C. 10321(a) (see p. 3, *supra*), relied upon by this Court in *ATA*, providing that enumeration of one ICC power does not exclude any other. *Id.* at 2467 n.11.

The court of appeals' determination that the ICC could achieve the partial deregulation it sought only through a rulemaking proceeding also conflicts with the decisions of this Court establishing the "well-settled principles" that agencies have broad discretion to determine which of their authorities to invoke to achieve a desired result; that their actions are presumed valid; and that courts must defer to and accept an agency's reasonable interpretation of its own statutory authority if not contrary to the clearly expressed intention of Congress. *E.g.*, *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 81 L.Ed.2d 694, 702-04 (1984); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86-87, 98-99 (1975); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

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[36] This Court had also previously recognized that the ICC's express authority to sanction or prevent railroad conduct in its entirety includes implied or ancillary authority to take intermediate or conditional action short of complete sanction or prevention. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654-57 (1978); *United States* v. *Chesapeake & O. Ry.*, 426 U.S. 500, 509-15 (1976).

CONCLUSION

This Court should grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PAUL A. CUNNINGHAM*
GERALD P. NORTON
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for Petitioner

PEPPER, HAMILTON & SCHEETZ
Of Counsel

*Counsel of Record

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